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October Term, 1932

THE STATE OF WASHINGTON on the relation of BOND & GOODWIN & TUCKER, INCORPORATED, a dissolved Delaware corporation,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, Judge thereof,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

BOND & GOODWIN & TUCKER, INCORPORATED, A DISSOLVED DELAWARE CORPORATION.

ELMER E. TODD,
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Seattle, Washington.

No. 663

Supreme Court of the United States

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT
BOND & GOODWIN & TUCKER, INCORPORATED, A DISSOLVED DELAWARE CORPORATION.

I.
OPINIONS OF THE COURT BELOW.

The final opinion of the Supreme Court of the State of Washington in this case is reported in *The State of Washington on the relation of Bond & Goodwin & Tucker, Incorporated, plaintiff, v. The Superior Court for Spokane County, et al., respondents, 169 Wash. 688.*

There were, in fact, two opinions filed, namely, an opinion filed October 13, 1932 (R. 28), and an opinion filed December 2, 1932, denying a petition for rehearing (R. 44). The reporter, in making up volume 169 of the official Washington Reports, made the original opinion of October 13, 1932, conform to the opinion filed December 2, 1932 (R. 44).

The letter "R," wherever used in this brief, means the printed transcript of record.

II.
JURISDICTION.

The appellant refers to the Statement as to Jurisdiction which is part of the record and printed separately.

III.
WASHINGTON STATUTES INVOLVED IN THIS APPEAL.

Section 3854 of Remington's Compiled Statutes of Washington, 1922, (being ch. 46, Laws of Washington (1909), p. 72, amending Section 3 of an Act approved March 28, 1890, Laws of Washington, 1889-1890, pp. 288, 290) relating to foreign corporations, reads as follows:

> "Such corporations shall also constitute and appoint an agent, who shall reside at the place in

the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is to be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and recording with the Secretary of State a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made,

until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

Section 227 of Remington's Compiled Statutes of Washington, 1922 (being ch. CXXVII, Laws of Washington, 1893, Sec. 8, p. 409) relating to domestic corporations, reads as follows:

"Whenever any corporation, created by the laws of this state, or late territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the Secretary of State, which shall be taken, deemed and treated as personal service on such corporation; provided, a copy of said summons, writ, or other process shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation, at the place where the main business of such corporation is transacted, when

such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper printed and published at the seat of government of this state, before such service shall be deemed perfect."

Section 7044 of Remington's Compiled Statutes of Washington, 1922 (being ch. 49, Laws of Washington, 1911, Sec. 13, p. 173) relating to foreign insurance companies, insofar as the provisions thereof are pertinent, reads as follows:

"Service of process against any such insurance company may be had by serving duplicate copies upon the commissioner through the mail by a registered letter, or by an officer or person competent to serve a summons. Upon such service being made, the commissioner shall forthwith mail one of such duplicate copies of such process to such company at its home office or general agency, or in the case of an alien company, to the resident manager, if any, in this country."

IV.

STATEMENT OF THE CASE.

On or about April 9, 1926, the appellant, Bond & Goodwin & Tucker, Incorporated, a Delaware corporation, qualified to do business in the State of Washington and on said date appointed one Duncan Shaw, of Seattle, Washington, as its resident agent for the service of process, as required by Section 3854, Remington's Compiled Statutes of Washington, 1922 (R.

15). On or about November 29, 1929, said Bond & Goodwin & Tucker, Incorporated, withdrew from the state of Washington and ceased to transact any business therein, and caused a formal notice of its withdrawal to be duly filed with the Secretary of State of the State of Washington on December 5, 1929 (R. 11 and 15). On or about the same date said Bond & Goodwin & Tucker, Incorporated, was duly dissolved under the laws of the State of Delaware and a certificate of such dissolution was issued by the Secretary of State of the State of Delaware on December 11, 1929 (R. 12). The appointment of said Duncan Shaw as statutory agent in the State of Washington for services of process was never revoked (R. 15). During the year 1929 said Duncan Shaw voluntarily moved from the State of Washington to the State of California (R. 16).

Shortly prior to April 18, 1932, one W. A. Monroe commenced a civil action in the Superior Court of the State of Washington for Spokane County, being Cause No. 90,636 therein, naming Bond & Goodwin & Tucker, Incorporated, as one of several defendants. The plaintiff in said action sued as an assignee of numerous persons whose residences are not stated and who may or may not have been residents of the State of Washington; also, so far as is disclosed by the typical cause of action shown in appellee's return to the alternative writ of prohibition, the alleged causes of action sued

upon may or may not have arisen in the State of Washington (R. 22). The complaint contains one hundred fifty-seven such causes of action and covers four hundred seventy-eight closely printed pages (R. 5). The appellant has never been furnished a copy of the complaint and the record does not disclose the total amount prayed for on the one hundred and fifty-seven various causes of action (R. 2, 14).

On April 18, 1932, said plaintiff caused one copy of his summons and complaint in said action to be left in the office of the Secretary of State of the State of Washington (R. 15). The return and proof of service filed by said plaintiff in the office of the Clerk of the Superior Court for Spokane County discloses that the only service of summons and complaint attempted upon appellant Bond & Goodwin & Tucker, Incorporated, was made by leaving said copy of said summons and complaint in the office of the said Secretary of State aforesaid, with one A. M. Kitto, Assistant Secretary of State (R. 7). Neither the Secretary of State nor the Assistant Secretary of State of the State of Washington forwarded to said appellant, Bond & Goodwin & Tucker, Incorporated, or to any of its officers or agents, said summons and complaint so left, as aforesaid, or any copy thereof, or any notice whatever regarding the same (R. 15), said Secretary of State of the State of Washington recognizing no legal duty to forward to said appellant or any

of its officers or agents said summons and complaint, and no legal duty to furnish said appellant with a copy thereof or any notice regarding the same (R. 15).

Except for said purported or attempted service upon the office of the Secretary of State, no service of summons or complaint has been made or attempted upon the appellant Bond & Goodwin & Tucker, Incorporated, and appellant, in fact, received no copy of any summons or complaint in said action in the Superior Court of Spokane County, nor any notice or knowledge of the action except through hearsay and report (R. 2, 13, 14).

On the 7th day of May, 1932, appellant, specially appearing in said action in the Superior Court of the State of Washington for Spokane County for that purpose and no other, filed its motion to quash service of process, supported by affidavits (R. 8). Thereafter, on the 14th day of May, 1932, appellant's motion to quash came on for hearing before the Hon. Joseph B. Lindsley, Judge of said Superior Court, and, after argument by respective counsel, said Court denied said motion, allowing appellant a stay of proceedings to enable appellant to apply to the Supreme Court of the State of Washington for an alternative writ of prohibition (R. 18).

Thereafter, in due course, the appellant applied to the Supreme Court of the State of Washington for

a writ of prohibition, prohibiting and enjoining the Superior Court of the State of Washington for Spokane County from further proceeding in said cause or exercising any jurisdiction therein over the appellant, Bond & Goodwin & Tucker, Incorporated (R. 1). An alternative writ of prohibition and an order to show cause were issued, appellees appearing thereto by demurrer (R. 19), and subsequently, by filing a return (R. 21). Thereafter the application was submitted to the Court upon printed briefs and oral argument, first before a Department of the Court on the 10th day of June, 1932, and thereafter, by order of the Court, before the Court *en banc* on the 1st day of July, 1932 (R. 28).

On October 13, 1932, an opinion of the Court was filed denying the application for writ of prohibition (R. 28). Appellant thereupon filed its petition for rehearing and/or a modification of the opinion (R. 38). On December 2, 1932, a second opinion by the Supreme Court of Washington was filed, denying appellant's petition for rehearing, but modifying the Court's former opinion in certain particulars (R. 44). On December 2nd, 1932, final judgment was entered denying the application of appellant for writ of prohibition, and from that judgment this appeal is taken (R. 45).

V.

QUESTIONS PRESENTED TO THE SUPREME COURT OF WASHINGTON AND ITS DECISION THEREON.

The questions presented to the Supreme Court of Washington involved both the "due process" and the "equal protection" provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and may be stated as follows:

(1) Whether the provision of the Washington statute (Section 3854 of Remington's Compiled Statutes of Washington, 1922) which authorizes service of process upon a foreign corporation which has withdrawn from transacting business in said State by leaving a copy thereof in the office of the Secretary of State, and which imposes no duty upon the Secretary of State or the plaintiff in the action to give the defendant corporation any notice thereof, provides for due process of law as to such corporate defendant, and whether, by such service, no notice in fact having been given, the State Court acquired jurisdiction over such corporate defendant.

(2) Whether the provision of the Washington statute (Section 3854 of Remington's Compiled Statutes of Washington, 1922) which authorizes service of process upon a foreign corporation which has withdrawn from transacting business in said State by leav-

ing a copy thereof in the office of the Secretary of State and which imposes no duty upon the Secretary of State or the plaintiff in the action to give such corporate defendant any notice thereof, affords such corporate defendant the equal protection of the laws, when, in the case of domestic corporations having no officer in said State upon whom legal service of process can be made, notice to such corporations is required (Section 227 of Remington's Compiled Statutes of Washington, 1922) where service is made on the Secretary of State, and when, in the case of foreign insurance companies, notice to such foreign insurance corporations is required (Section 7044 of Remington's Compiled Statutes of Washington, 1922) where service is made on the State Insurance Commissioner.

(3) Whether service of process by leaving a copy thereof in the office of the Secretary of State with the Assistant Secretary of State, where the defendant is a foreign corporation and has withdrawn from transacting business in the State, and the statute (Section 3854 of Remington's Compiled Statutes of Washington, 1922) does not designate the Assistant Secretary of State for that purpose and does not impose upon him any duty to give notice, constitutes due process of law as to said foreign corporation.

The Supreme Court of the State of Washington answered all of the foregoing questions in the affirma-

tive, three of the Justices thereof dissenting (169 Wash. 688).

VI.

SPECIFICATION OF ERRORS.

The errors assigned in the record which appellant intends to urge and upon which appellant relies for a reversal of the judgment of the Supreme Court of the State of Washington dated December 2, 1932, are:

(1) The Supreme Court of the State of Washington erred in holding that the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of summons and complaint upon the appellant, Bond & Goodwin & Tucker, Incorporated, was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State of the State of Washington, are not repugnant to and are not in conflict with and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the particular provisions of said Section 3854 regarding service of process upon a foreign corporation, where such corporation has withdrawn from the State, do not require the Secretary of State or the plaintiff in the action to give said corporation any notice of such service of process or any copy of the summons or complaint or in any other way to give such corporation any notice or information as to the nature and char-

acter of the action so as to enable such corporation to make a defense thereto and the State of Washington, by and through said Section 3854, assumes and seeks to deprive the appellant of its property without due process of law (R. 47).

(2) The Supreme Court of the State of Washington erred in holding that the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of summons and complaint upon the appellant Bond & Goodwin & Tucker, Incorporated, was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State of the State of Washington, are not repugnant to and are not in conflict with and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the particular provisions of said Section 3854 regarding service of process upon a foreign corporation, where such corporation has withdrawn from the State, are less favorable than similar provisions regarding service of process contained in Section 227 of Remington's Compiled Statutes of Washington, 1922, as to service on domestic corporations, where no officer or agent of such corporation can be found in the State, and are less favorable than similar provisions regarding service of process contained in Section 7044 of Remington's Compiled Statutes of Washington, 1922, as to service of process on foreign insur-

ance companies, and the State of Washington, by and through said Section 3854, assumes and seeks to deny to the appellant the equal protection of its laws (R. 47).

(3) The Supreme Court of the State of Washington erred in holding that under the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, jurisdiction over the person of the appellant Bond & Goodwin & Tucker, Incorporated, was acquired by the Superior Court of the State of Washington for Spokane County in the case of *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., Bond & Goodwin & Tucker, Incorporated, and others Defendants*, pending in said Court, by leaving one copy of the summons and complaint in said action with the Assistant Secretary of State of the State of Washington, in that said Section 3854 does not provide for service of process upon a foreign corporation, after it has withdrawn from the State, by leaving a copy of the summons and complaint with the Assistant Secretary of State of the State of Washington and does not require the Assistant Secretary of State or the plaintiff in the action to give said corporation any notice of such service or any copy of the summons or complaint or in any other way to give such corporation any notice or information as to the nature and character of the action so as to enable such corporation to make a defense

thereto and by and through such attempted service of process the State of Washington assumes and seeks to deprive the appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 48).

(4) The Supreme Court of the State of Washington erred in holding that jurisdiction over the person of the appellant Bond & Goodwin & Tucker, Incorporated, was acquired by the Superior Court of the State of Washington for Spokane County in the case of *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., Bond & Goodwin & Tucker, and others, Defendants*, pending in said court, by leaving one copy of the summons and complaint in said action with the Assistant Secretary of State of the State of Washington, in that, under the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, there is no provision for service of process upon the Assistant Secretary of State and by such service of process the State of Washington assumes and seeks to deprive appellant of its property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 49).

(5) The Supreme Court of the State of Washington erred in holding that the Superior Court of the State of Washington for Spokane County acquired

jurisdiction over the person of the appellant Bond & Goodwin & Tucker, Incorporated, in the case of *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., and Bond & Goodwin & Tucker, Incorporated, and others, Defendants,* in that the attempted service of process upon the appellant, Bond & Goodwin & Tucker, Incorporated, personally, within the State of Washington after it had withdrawn from said State, by leaving a copy of the summons and complaint with the Secretary or Assistant Secretary of State of the State of Washington, in the manner provided by Section 3854 of Remington's Compiled Statutes of Washington, 1922, is repugnant to and in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and thereby the State of Washington assumes and seeks to deny the appellant the equal protection of its laws (R. 49).

(6) The Supreme Court of the State of Washington erred in denying to the appellant a permanent writ of prohibition enjoining and restraining the Superior Court of the State of Washington for Spokane County from proceeding with the trial of the cause pending before it entitled *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., and Bond & Goodwin & Tucker, Incorporated, and others, Defendants,* as against the appellant, and from exercising any jurisdiction therein over the appellant, in that the at-

tempted service of process upon the appellant, by leaving a copy of the summons and complaint with the Secretary or Assistant Secretary of State of the State of Washington in the manner provided by Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which attempted service of process said Superior Court claims to have acquired such jurisdiction, was and is repugnant to and in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and thereby the State of Washington assumes and seeks to deprive the appellant of its property without due process of law and to deny to appellant the equal protection of its laws (R. 50).

VII.

SUMMARY OF ARGUMENT.

The proceeding below and this appeal directly raise the question of the jurisdiction of the Superior Court of the State of Washington for Spokane County over the person of the appellant Bond & Goodwin & Tucker, Incorporated.

The principal question involved, succinctly stated, is whether a state may consistently with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States confer on its courts jurisdiction *in personam* over a foreign corporation which has withdrawn from the State and ceased to do

business therein, by service of process upon a State officer *but without imposing upon said State officer the duty of giving to such corporation any notice whatsoever of the commencement of the action.*

Subordinate to the proposition above stated is the further question whether a State may consistently with the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States confer on its courts jurisdiction *in personam* over a foreign corporation which has withdrawn from the State and ceased to do business therein, by service of process upon a State officer *but without imposing upon said State officer the duty of giving to such corporation any notice whatsoever of the commencement of the action*, when, in the case of a domestic corporation having no officer in said State, notice to such corporation is required in case of service on a State officer, and when, likewise, in the case of a foreign insurance company, notice to such foreign insurance company is required when service is made on a State officer.

Even though the foregoing questions should be resolved against the appellant, there still remains the question whether a State may consistently with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States confer on its courts jurisdiction *in personam* over a foreign corporation which has withdrawn from the State and ceased to do business therein, by service of process upon an

assistant State officer (to-wit, an Assistant Secretary of State) without designating such assistant State officer by its statute as a person upon whom process may be served and without imposing upon him any duty of giving to the defendant corporation any notice of the commencement of the action.

Appellant's argument will discuss the foregoing questions with reference to the treatment given them by the Supreme Court of the State of Washington and in connection with the authorities cited to the State Court by the appellees. The points advanced in appellant's argument are as follows:

(1) The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of process was made upon the appellant, deprives appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that no notice of the commencement of the action against it was required to be given or in fact given to appellant (pages 23 to 24).

(2) Appellant did not waive its constitutional objections to Section 3854 of Remington's Compiled Statutes of Washington, 1922, by entering the State of Washington and appointing an agent of its own choosing for the service of process (pages 24 to 29).

(3) The cases cited by the appellee in the State Court, two of which were relied upon by the Supreme

Court of the State of Washington, do not support the theory that appellant accepted the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, with respect to service of process upon the Secretary of State, by entering the State and appointing a process agent of its own choosing (pages 29 to 39).

(4) The cases of *Wuchter v. Pizzutti*, 276 U. S. 13, and *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, are clearly applicable to the case at bar and should have controlled the judgment of the Supreme Court of the State of Washington (pages 39 to 43).

(5) The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of process was made upon appellant, denies appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that there is no requirement for giving notice of the commencement of the action, whereas when service is made under other statutes upon corporations similarly situated, notice is required to be given (pages 43 to 47).

(6) The attempted service of process upon appellant corporation by leaving a copy thereof with the Assistant Secretary of State does not constitute that due process of law required by Section 1 of the Fourteenth Amendment to the Constitution of the United States where the statute does not name the Assistant Secretary of State as a person upon whom process may be served and does not impose upon him any duty to give notice (pages 47 to 49).

VIII.

ARGUMENT.

The Provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, Under Which Service of Process Was Made Upon the Appellant, Deprives Appellant of Its Property Without Due Process of Law, in Violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in That No Notice of the Commencement of the Action Against It Was Required To Be Given or in Fact Given to Appellant.

The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, regarding service upon a foreign corporation which has withdrawn from the State, is in conflict with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States in that neither the State officer upon whom process is to be served, nor the plaintiff in the action, is required by the statute to give the defendant corporation any notice of the service or any copy of the complaint or summons, or otherwise to inform the defendant corporation of the commencement of the action so as to enable it to make a defense thereto. Therefore, the attempted service of summons and complaint in the instant case upon appellant Bond & Goodwin & Tucker, Incorporated, by leaving one copy of the summons and complaint in the office of the Secretary of State of the State of Washington, though authorized by State statute, deprives appellant of its property without due process of law,

in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. Said State statute is, accordingly, unconstitutional and void and said purported service of process is invalid and the Superior Court of the State of Washington for Spokane County acquired no jurisdiction over the person of appellant by reason thereof.

This Court has always recognized that notice of some character, reasonably calculated to bring home to a defendant the fact that an action has been commenced and the character thereof is an essential element of due process of law. In two recent cases it has been held by this Court that State statutes providing for service of process upon State officers in actions against non-residents, both individual and corporate, do not provide due process of law where they do not impose upon the State officer any duty or obligation to give the non-resident defendant notice of the commencement of the action.

Wuchter v. Pizzutti, 276 U. S. 13.

Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559; reversing 127 Okla. 295.

Appellant Did Not Waive Its Constitutional Objections to Section 3854 of Remington's Compiled Statutes of Washington, 1922, by Entering the State of Washington and Appointing an Agent of Its Own Choosing for the Service of Process.

The Supreme Court of the State of Washington, in its decision in the instant case (169 Wash. 688),

recognized the general doctrine announced in the two decisions of the Supreme Court of the United States above cited, but held the service of process upon the appellant herein valid on the theory that appellant, in entering the State of Washington and by appointing an agent for the service of process as required by Section 3854, thereby accepted the provisions of said Section with respect to service of process on the Secretary of State and forever waived its right to object thereto later on.

The fact is, however, that when appellant entered the State of Washington to do business therein and complied with Section 3854 to the extent of designating an agent of its own choosing for the service of process, its consent went no further than a consent to be bound by a service made upon its designated agent, and it was not then required to face and did not face the further provision of the statute regarding service upon the Secretary of State, and was not then called upon to waive and did not waive any rights conferred upon it by the Constitution of the United States regarding the particular provision of said Section 3854 providing for service upon the Secretary of State.

It is not the law that a foreign corporation, by the mere fact of its entering a State to do business and its compliance with a State statute insofar as the same is constitutional, thereby waives its right to ob-

ject to other and unconstitutional provisions of the same statute. No general waiver of constitutional rights arises by a compliance with the constitutional provisions of a State statute and no State may exact of a foreign corporation, as a condition of its doing business in the State, a waiver of its constitutional rights.

That a foreign corporation is not so prevented from raising a question, under the Constitution of the United States, regarding a state statute, is amply sustained by the decisions of the Supreme Court of the United States. These decisions are all to the effect that while a State may deny to a foreign corporation the right to transact business within its borders and therefore attach to the grant of such privilege any condition which it chooses, yet the conditions must not have the effect of depriving such corporation of its constitutional rights. The Court holds that in such cases the obtaining by a foreign corporation of permission to do business in the State and/or its actual transaction of business in the State and/or its action in accepting that part or portion of the State's statutes which are constitutional, is not a waiver of any constitutional right which it may have as against unconstitutional provisions of the state's statutes, nor is the foreign corporation in any wise estopped to assert the invalidity of any statute on constitutional grounds.

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494;
Power Mfg. Co. v. Saunders, 274 U. S. 490;
Quaker City Cab Co. v. Penn., 277 U. S. 389;
Terral v. Burke Const. Co., 257 U. S. 529;
Frost v. R. R. Comm., 271 U. S. 583;
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426.

To put the matter more specifically we desire to quote from three of the foregoing cases.

In the *Terral* case, the same State statute that contained the provisions regarding the admission of a foreign corporation to do business in the State of Arkansas also contained an unconstitutional provision regarding removal of causes, and this latter provision of the statute was under attack, just as the latter provision of Section 3854 of Remington's Compiled Statutes of Washington (1922) is here under attack. The Court said:

> "The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal Courts or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not."

In the *Hanover Fire Insurance Company* case, the Court said:

"One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits is contractual, and that by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions and can not object to a condition or law regulating its obligations even though as a statute operating *in invitum* it may be in conflict with constitutional limitations. This argument cannot prevail in view of the decisions of this court in well-considered cases."

In the *Power Manufacturing Co.* case, the Court said:

"The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the State statutes which is in conflict with the Constitution of the United States. The principal cases are cited and reviewed in *Hanover F. Ins. Co. v. Harding* (*Hanover F. Ins. Co. v. Carr*), 272 U. S. 494, 507, *et seq.*, *ante*, 372, 49 A. L. R. 713, 47 Sup. Ct. Rep. 179, and *Frost & F. Trucking Co. v. Railroad Commission*, 271 U. S. 583, 594, *et seq.*, 70 L. ed. 1101, 1105, 47 A. L. R. 457, 46 Sup. Ct. Rep. To them may be added the case of *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 468, 45 L. ed. 619, 626, 21 Sup. Ct. Rep. 423, where it was held that 'the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or

to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States.' "

The Cases Cited by the Appellees in the State Court, Two of Which Were Relied Upon by the Supreme Court of the State of Washington, Do Not Support the Theory That Appellant Accepted the Provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, with Respect to Service of Process Upon the Secretary of State, by Entering the State and Appointing a Process Agent of Its Own Choosing.

The appellees in their brief and argument before the Supreme Court of Washington sought to distinguish the case of *Wuchter v. Pizzutti*, 276 U. S. 13, and the case of *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, upon the ground that, in the *Wuchter* case, an individual defendant, and, in the *Muegge* case, a corporate defendant, had entered the respective States without in any way attempting to comply with their laws, whereas, in the instant case, appellant had complied with the law of Washington to the extent at least of appointing a resident agent for the service of process, and had thereby accepted all the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, including the provision with respect to service of process upon the Secretary of State. The Supreme Court of Washington accepted the distinction urged by appellees, relying chiefly upon the cases of *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, and *Pennsyl-*

vania Fire Insurance Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93.

Appellant's first answer to the foregoing purported distinction is that the distinction itself is not sound. This Court has held that in the matter of the constructive presence of a foreign corporation, no difference exists in the law with respect to such corporation's express or implied acceptance of local laws based upon the fact that the corporation has or has not in some measure complied with those laws in transacting its business in the particular State. In other words, consent to the unconstitutional provisions of a State statute is no more to be implied from the fact of having complied with the constitutional provisions of the same statute than such consent is to be implied from the mere doing business in the State without any attempt at compliance with the State statutes.

> *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8.

Neither the case of *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, nor the case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, relied upon by the Supreme Court of Washington, supports the doctrine that a foreign corporation, by complying with the constitutional provisions of a State statute, thereby ac-

cepts all the provisions of the same statute, including the unconstitutional provisions thereof.

In the first of the foregoing cases (*Mutual Reserve Fund Life Association v. Phelps*) the State statute involved expressly provided that a foreign corporation, upon entering the State, should consent to service upon a designated agent or upon the Insurance Commissioner. Acting under this statute, the defendant corporation filed its consent to service on the Insurance Commissioner. Therefore, the defendant corporation, in the most formal manner, consented that it might be served with process through service made on the Insurance Commissioner. After the corporation had withdrawn from the State it attempted to avoid the effect of its formal consent. The Court held that the service of process on the Insurance Commissioner was valid. It is important to point out, however, that the State statute in this case required that the Insurance Commissioner, upon being served, should mail the process to the corporation at its principal office. In other words, the State statute fulfilled the very requirement of giving notice, whereas, in the instant case, the Washington State statute provides for no notice whatever. The Supreme Court of Washington, in its discussion of this case, seems to have overlooked the fact that the Kentucky statute, as quoted by Mr. Justice Brewer in the Statement of the Case, shows an express provision for the mailing of notice.

The general language used in the decision regarding the question of consent must, of course, be read in the light of the facts of the case, which were, as heretofore pointed out, that the defendant corporation had specifically consented that service might be made upon the Insurance Commissioner, and the sole question was whether or not such service would sustain an action brought against the Company after it had withdrawn from the State.

In the case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, the action arose in the State of Missouri on an insurance policy issued by the defendant corporation in the State of Colorado. The defendant corporation was doing business in Missouri and had filed in that State a power of attorney, consenting to service of process on the Superintendent of Insurance, as required by the Missouri statute. The contention in the case was that the Missouri statute only authorized service in suits growing out of local business and, if otherwise construed, would be unconstitutional. The Missouri Supreme Court held that the statute applied. This Court held that the construction of the statute by the Missouri court left no constitutional question open because the corporation had, by a formal document, expressly consented that service of process upon the Superintendent of Insurance should be deemed personal service upon the Company, and that where a corporation

had thus *expressly* consented to be sued by service upon a State official, it took the risk of such interpretation as the State Court might put upon the statute with respect to actions which could be brought under it. No question regarding notice was raised or decided in this case and the case has no bearing upon the question now before this Court.

In addition to the two cases just discussed, namely, *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, and *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, relied upon by the Supreme Court of Washington, counsel for appellees cited to the State Court several cases decided by lower Federal Courts and by State Courts to which a short reference will be made for the purpose of showing that they are inapplicable to the situation involved in the case at bar.

In all of the cases so cited by appellees (except the cases of *Olender v. Crystalline Mining Co.*, 149 Cal. 482, *Western Grocer Co. v. New York Oversea Co.*, 296 Fed. 269, and *Davis v. Kansas & Texas Coal Co.*, 129 Fed. 149) the particular State statutes before the Court required some form of notice to the defendant. The language of a court used in sustaining a State statute actually providing for notice is clearly not applicable to a statute like the Washington statute which provides for *no* notice to a defendant.

Kelly v. Johnson Nut Co., 38 Fed. (2) 177, C. C. A. 6th Circuit (Ohio), (1930).

In this case service of process was made upon an agent expressly appointed by the corporation for that purpose. The question involved in the case was the effect of the corporation's withdrawal from the State upon the court's jurisdiction of a cause of action arising out of transactions in the State.

Chenalis River Lbr. & Sh. Co. v. Empire State Surety Co., 206 Fed. 559 (Western District of Wash. 1913).

The portions of the Washington statute set out in the opinion do not show the fact that they did provide that where service of summons is made upon the Insurance Commissioner in an action against a foreign corporation, the Commissioner shall mail a copy of the process to the defendant at its home office or general agency. (See Chap. 49, Laws of Wash. 1911, p. 173, Sec. 13.) The only question before the Court in this case was the effect of the corporation's withdrawal from the State upon the jurisdiction of the Court where a service of summons had been made on the Insurance Commissioner after such withdrawal.

DuPont Engineering Co. v. Harvey Construction Co., 156 Va. 582, (1931).

The question involved in this case was the effect of the withdrawal and dissolution of a Delaware corporation upon the jurisdiction of the Virginia Court acquired by service of process on the Secretary of State, expressly appointed by the corporation as its agent for such service. While

the opinion does not disclose the duties of the Secretary of State in case he is served with process, the Virginia statute is set out in full in the earlier case of *American Railway Express Co. v. Fleishman,* 149 Va. 200, which is cited and relied upon in the *DuPont* case. An examination of this statute shows an express requirement that the Secretary of State shall mail a copy of the process to the defendant corporation.

Frazier v. Steele & Tube Co., 101 W. Va. 327, (1926).

This case, likewise, involved the question of the effect of a corporation's withdrawal from the State upon the jurisdiction of the State Court acquired by service of process on the State Auditor, who was designated by statute as the agent of the corporation for that purpose. The duties of the State Auditor are not disclosed by the opinion, but a reference to the West Virginia statute shows that there was an express provision that the State Auditor should transmit process served upon him by registered mail to the defendant corporation. (See W. Va. Code 1919, ch. 54, Sec. 24-a; also W. Va. Code 1931, ch. 31, Art. 1, Sec. 71; also *St. Mary's Franco-American Petroleum Co. v. W. Va.,* 203 U. S. 183, where an earlier West Virginia statute with similar provisions as to notice is fully set out.)

As heretofore indicated, all of the cases cited by appellee, except the three cases next to be considered, were decided in connection with State statutes which required the State official upon whom process was served to give some notice thereof to the defendant corporation.

In *Olender v. Crystalline Min. Co.,* 149 Cal. 482, (decided in 1906), the Court had before it a State statute which made no provision for notice. The defendant corporation in that case was doing business in the State but had not appointed an agent for the service of process. The Court said:

> "It is therefore in no position to invoke the constitutional doctrine that the defendant must have notice of an action against him and an opportunity to be heard."

This case was relied upon by the Supreme Court of Oklahoma in *Kaw Boiler Works v. Frymyer,* 100 Okla. 81, which in turn was the basis of the decision in *Consolidated Flour Mills Co. v. Muegge,* 127 Okla. 295, which latter case was reversed on this point by the Supreme Court of the United States in *Consolidated Flour Mills Co. v. Muegge,* 278 U. S. 559. So far as the *Olender* case is concerned, it is to be noted that the legislature of California, in 1929, amended the California statute so as to require the Secretary of State not only to forward the process served upon him to the principal office of the defendant corporation, but, also, immediately upon being served, to telegraph the defendant corporation that such service had been made. The California statute also requires that the plaintiff shall furnish the Secretary of State with the defendant's address in case such address is not on file. (California Laws, 1929, ch. 712; laws of 1931, ch. 682, Sec. 406-a.)

It is noteworthy that the legislature of the State of California changed the law of that State to provide for adequate notice to a non-resident defendant corporation, in spite of the decision in the case of *Western Grocer Co. v. New York Oversea Co.*, 296 Fed. 269, (decided in 1924), which is one of the three cases specially relied upon by counsel for appellees in the lower court. We respectfully submit, however, that, in the *Western Grocer* case, the point was not raised that the then California statutes providing for service of process on the Secretary of State were invalid because they failed to provide for notice to a non-resident defendant corporation of the commencement of an action. A reading of the opinion clearly discloses that the case was disposed of by reference to the decision in *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, and *Davis v. Kansas & Texas Coal Co.*, 129 Fed. 149, and, like them, only involved the question of whether a foreign corporation, by its mere withdrawal from a State, might defeat jurisdiction where jurisdiction otherwise existed.

Davis v. Kansas & Texas Coal Co., 129 Fed. 149, Circuit Court, Western Dist. of Arkansas.

The statute of Arkansas provided for service of process on the State Auditor in case a foreign corporation doing business in the State failed to appoint an agent. No point was raised in

> the case regarding the unconstitutionality of the State statute on the ground that it did not require notice to the defendant of the commencement of the action. Whatever the Arkansas statutes may have required at the time this case was decided in 1904, the Arkansas legislature, by an Act of 1917 having provided for the appointment of the Secretary of State as the person upon whom process could be served, specifically required that the Secretary of State should cause the process to be mailed to the defendant's principal office. (See Crawford and Moses 1921 Dig., Sec. 1827.)

At this point, we may also point out that the legislature of the State of Oklahoma, since the decision by this Court in the *Mucgge* case, has amended its statute so as to require that in case of service upon the Secretary of State plaintiff must set out in his petition the address of the Secretary of the foreign corporation and the Secretary of State is required to immediately forward a copy of the summons to such Secretary of said defendant corporation. (Compiled Statutes of Okla. 1921, Sec. 5442, as amended by Laws of 1929, ch. 226.)

In other words, whatever may be said of the *Olender* case, the *Western Grocer* case and the *Davis* case, it now transpires that both the California and the Arkansas legislatures have amended the statutes in those States so that when service of process is made upon a State official in an action instituted against a foreign corporation that has withdrawn from the

State, adequate provision for notice of the commencement of the action is assured, and as to all the other cases cited by the appellee an examination of the State statutes discloses that adequate provision had already been made in each State for notice of the commencement of an action against a foreign corporation after it has withdrawn from the State, where service of process is made upon a State official.

The cases of Wuchter v. Pizzutti, 276 U. S. 13, and Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559, Are Clearly Applicable to the Case at Bar and Should Have Controlled the Judgment of the Supreme Court of the State of Washington.

It is clear that prior to the case of *Wuchter v. Pizzutti*, 276 U. S. 13, and the case of *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, the Supreme Court of the United States had not specifically passed upon the question of whether a State statute like Section 3854 of Remington's Compiled Statutes of Washington, 1922, providing for service of process upon a State officer without any manner of notice to the defendant corporation, was constitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States. Prior to the *Wuchter* case several State Courts of last resort, as in California and Oklahoma, had held such a service statute good. (See *Olender v. Crystalline Min. Co.*, 149 Cal. 482; *Kaw Boiler Wks. v. Frymyer*, 100 Okla. 81; *Consolidated Flour Mills Co. v. Muegge*, 127 Okla. 295.) At

the same time several other State Courts of last resort had held such statutes unconstitutional in that they failed to provide any manner of notice to the defendant corporation. (See *Gonner v. Miss. Valley Bridge & Iron Co.*, 123 La. 964; *Pinney v. Providence Loan, etc., Co.*, 106 Wis. 396.) Also, insofar as the lower Federal Courts had spoken on this particular subject, *namely, the necessity for some form of notice to the defendant corporation*, these Courts had held that a service statute which contained no provision for such notice was unconstitutional. (*Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Southern Railway Co. v. Simon*, 184 Fed. 959.) In this state of the authorities the *Wuchter* case was decided by the Supreme Court of the United States in February, 1928.

It is true that this decision concerned an individual and not a corporation. It is also true that in one paragraph of the decision Mr. Chief Justice Taft stated that the cases affecting non-resident corporations were not especially applicable, and added in this connection that:

> "Such corporations may be properly required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident

> individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued."

But, in the same paragraph, and in order that the foregoing language might not be misapplied, the then Chief Justice used the following language:

> "Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a State official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. *Southern R. Co. v. Simon* (C. C.), 184 Fed. 959, 961; *Gouner v. Missouri Valley Bridge & Iron Co.*, 123 La. 964. In the latter case, the Louisiana Court said in respect to such a law: 'This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicil. When a petition can not legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction.' "

In the immediately following paragraph, obviously referring to the question of service on a foreign

corporation under a statute that fails to provide for notice, Mr. Chief Justice Taft stated:

> "The question is mooted in *Simon v. Southern R. Co.*, 236 U. S. 115, 129, and the above language is quoted, but it was not found necessary to decide the point."

In other words, the then Chief Justice did not state or intend to state, as might have been inferred from the earlier language of the opinion, that in the case of a foreign corporation, service upon a state official would be good regardless of notice, for he specifically points out that while this question had been mooted in the *Simon* case, it had not been there decided.

When, however, in the October term of 1928, the case of *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, came to the Supreme Court of the United States, a direct decision regarding the constitutionality of a State service statute which provided for service upon a foreign corporation by serving a State officer but containing no requirement providing for notice to the defendant, was unavoidable. It then became necessary for the Supreme Court of the United States to determine whether the principle regarding this question of the necessity of notice, which it had applied to a non-resident individual in the case of *Wuchter v. Pizzutti*, 276 U. S. 13, should also be applied for the protection of a foreign corporation.

Therefore, we respectfully submit that the Supreme Court in its *per curiam* opinion in the *Muegge* case necessarily directly determined this latter question when it reversed the decision of the Supreme Court of Oklahoma and predicated its reversal upon the authority of the *Wuchter* case.

Hence, it is now the established law that a State statute providing for service upon a State officer in a suit against a foreign corporation must provide some manner of notice to the defendant in order to bring the statute within the "due process" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, Under Which Service of Process Was Made Upon Appellant, Denies Appellant the Equal Protection of the Laws, in Violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in That There Is No Requirement for Giving Notice of the Commencement of the Action, Whereas When Service Is Made Under Other Statutes Upon Corporations Similarly Situated Notice Is Required To Be Given.

The statutes involved at this point in the argument are set out in full at pages 4 to 7 of this brief, but are here re-stated in part for the purpose of comparison.

The particular provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, here pertinent, reads as follows:

"In case said corporation shall revoke the authority of its designated agent after its withdrawal from this State and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the Secretary of State of the State of Washington, and the same shall be held as due and sufficient service upon such corporation."

Section 227, Remington's Compiled Statutes of Washington, 1922, providing for service of process on a domestic corporation where no officer of such corporation is in the State, reads as follows:

"Whenever any corporation, created by the laws of this State, or late Territory of Washington, does not have an officer in this State upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the Secretary of State, which shall be taken, deemed and treated as personal service on such corporation; provided, a copy of said summons, writ, or other process shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation at the place where the main business of such corporation is transacted, when such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper

printed and published at the seat of government of this State, before such service shall be deemed perfect."

The particular provision of Section 7044 of Remington's Compiled Statutes of Washington, 1922, here pertinent, applying to foreign insurance companies, reads as follows:

"Service of process against any such insurance company may be had by serving duplicate copies upon the commissioner through the mail by a registered letter, or by an officer or person competent to serve a summons. Upon such service being made, the commissioner shall forthwith mail one of such duplicate copies of such process to such company at its home office or general agency, or in the case of an alien company, to the resident manager, if any, in this country."

An examination of the foregoing statutory provisions clearly discloses that in the case of a foreign insurance company and in the case of a Washington corporation having no officer in the State upon whom service of process can be made, the Washington law, in providing for service of process upon a State officer, also provides for the giving of notice to the defendant in the action. Where the foreign corporation is an insurance company, the State officer, to-wit, the Insurance Commissioner, is required to mail a duplicate copy of the process to the Company; or, in the case of an alien company, to its resident manager. Where the corporation is a domestic corporation hav-

ing no officer in the State, the service on the corporation is not effective unless a copy of the summons, writ or other process is deposited in the post office, postage paid, directed to the Secretary or other proper officer of the defendant corporation and published in a newspaper for a specified period.

If the appellant is to be deemed as constructively in the State of Washington for the purpose of service of process and the exercise over it of the State Court's jurisdiction *in personam*, then it is clear from the foregoing resume of the Washington statutes that as between the appellant and a foreign insurance company similarly situated, and as between the appellant and a domestic corporation similarly situated, there is a wrongful discrimination resulting in a denial of the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Kentucky Finance Corporation v. Paramount Auto Exchange, 262 U. S. 544.

Power Mfg. Co. v. Saunders, 274 U. S. 490.

As against appellant's contention in this regard, counsel for appellees cited to the State Court the cases of *Hartford Fire Insurance Co. v. Perkins*, 125 Fed. 502, *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, and *Douglas v. N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377. It is sufficient to say that an examination of these cases throws no light upon the question.

The first two cases went off on the question of waiver of the alleged constitutional invalidity of the statute in question. These cases are earlier and contrary to the decisions of the Supreme Court of the United States in similar situations hereinbefore cited at page 27 of this brief. For instance, it appears specifically in *Hartford Fire Ins. Co. v. Perkins*, 125 Fed. 502, that the lower court there followed the decision of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, which was expressly overruled by subsequent decisions of the Supreme Court of the United States. (See *Terral v. Burke Construction Co.*, 257 U. S. 529.)

In *Douglas v. N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377, the Court there found no discrimination in fact, inasmuch as the statute complained of, when properly interpreted, applied equally to citizens of the State of New York and to citizens of other States. The fact that a foreign corporation was involved in that case had nothing to do with the question of discrimination.

The Attempted Service of Process Upon Appellant Corporation by Leaving a Copy Thereof with the Assistant Secretary of State Does Not Constitute That Due Process of Law Required by Section 1 of the Fourteenth Amendment to the Constitution of the United States Where the Statute Does Not Name the Assistant Secretary of State as a Person Upon Whom Process May Be Served and Does Not Impose Upon Him Any Duty to Give Notice.

"Due process" under the Federal Constitution, means exact compliance with service statutes. No alleged constructive consent to service of process upon a specifically designated State officer can possible extend to service upon another or subordinate State officer. The law is clear that a service of process upon an officer not designated by the statute is insufficient to secure jurisdiction over the person of a defendant in the position of the appellant herein.

The City of Watertown v. Robinson, 69 Wis. 230;

Amy v. Watertown, 130 U. S. 301;

Simon v. Southern Ry. Co., 195 Fed. 56;

Lonkey v. Keyes Silver Mining Co., 21 Nev. 312;

Bennett v. Maccabees, 40 Wash. 431.

In *The City of Watertown v. Robinson*, 69 Wis. 230, the Supreme Court of Wisconsin used the following language which was afterwards approved and adopted by the Supreme Court of the United States in *Amy v. Watertown*, 130 U. S. 301, at 317:

> "When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the

process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. * * * The designation of one particular officer upon whom service may be made excludes all others."

In *Riverside & D. R. Cotton Mills v. Menefee*, 237 U. S. 189, this Court held that proceedings in a court of justice to determine the rights and obligations of a corporation over which jurisdiction has not been acquired do not constitute due process of law and, that, the test of the right to acquire jurisdiction is the character and power of the person served as an agent of the corporation.

CONCLUSION.

It is a fundamental principle of our jurisprudence that every defendant in an action be entitled to sufficient notice thereof to assure it an opportunity of making a timely defense. A statute which permits a court to acquire jurisdiction over a defendant and to render a judgment through a service of process which begins and ends in a State office and which makes no provision, by any form of notice or service, for bringing to the attention of the defendant the fact that it has been sued, is clearly unconstitutional under the "due process" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States. Also, a service statute which dis-

criminates, in the matter of notice, between a foreign corporation having no agent in the State upon whom process can be served and a domestic corporation having no officer in the State upon whom process can be served, is unconstitutional under the "equal protection" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The "equal protection" provision may also be invoked when, as in the instant case, there is a substantial discrimination between one particular type of foreign corporation, like an insurance company, and a foreign investment corporation, like appellant herein.

Moreover, "due process" requires an exact compliance with the provisions of the service statute itself. The attempted service upon the Assistant Secretary of State of the State of Washington, who was neither named in the service statute as a person upon whom service could be made, nor required by the statute to give any notice to appellant of the fact of service, in no sense complies with the requirements of "due process."

For the several reasons hereinbefore stated, the said judgment of the Supreme Court of the State of Washington, dated December 2, 1932, should be re-

versed and a judgment ordered in favor of appellant and for costs.

Respectfully submitted,

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